an electromagnetic radiation (EM) hazard from such facilities, a belief and perception held by a segment of the real estate marketing (purchasing) population.

43. Therefore, the Board is of the opinion that, as testified to by Mr. Pavel, "public perception is marketing reality" when it comes to the purchasing of a property in proximity to such a facility, which perception is likely to translate into a diminished market, increased marketing time and decreased market prices.

44. Furthermore, the negative long distance visual impacts of a prominent antenna on an otherwise pristine mountain ridgeline translates into a negative marketing reality. That is, given a choice between two properties equal in character and quality and of equal market values, it is likely the average purchaser would opt for the property not attended by the visual negative of a tall telecommunications tower. This marketing reality also contributes to diminution of property values by limiting the market population and increasing market times.

45. The Board further concludes that the applicant has failed to adequately investigate, in good faith, the ability to colocate its telecommunications antenna on other towers in the area of the Township which would subject surrounding properties to a lesser, perhaps minimal, negative impact, such as co-location upon the Service Electric Cable T.V. tower (previously approved in September, 1993, for co-location by Bell Atlantic Mobile Systems, Inc.), on the former N.J. State Police tower or, perhaps, upon the Warren County 911 tower facilities proposed to be constructed within the Township at the Yard's Creek facility.

46. Although it is in fact correct that the subject property is located in the I-Industrial Zone District and the subject property and those surrounding it are zoned for industrial, not residential, uses, the reality of the circumstance is that the area is, for all practical and

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effective purposes, a residential neighborhood and has been developed with residential uses, not industrial or commercial uses, the prognosis of the subject property by the applicant's own witness, Robert McNeely Vance, in a written report, states: "(The property) appears unlikely to be developed with conforming industrial uses in the near future."

47. This fact (of residential, not industrial or commercial development) shifts the perspective of analysis for the Board from the zoned uses to the actual uses, which are residential, and suggests to the Board that the proposed use, while same would probably not be significantly incompatible with industrial uses is, in fact, massively incompatible with the actual uses, which are residential.

WHEREAS, as a result of the foregoing basic FINDINGS OF FACT, the Blairstown Township Zoning Board of Adjustment hereby makes the following ultimate CONCLUSIONS based thereon:

a. This application is made pursuant to the provisions of the Municipal Land Use Law, particularly N.J.S.A. 40:55D-70(d) and the paralleling provisions of the Blairstown Township Land Development Ordinance (Chapter XIX), Section 19-7.2(d), which provides, in pertinent part, that the Board of Adjustment shall have the power to:

> "d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to Article 8 of this act (N.J.S.A. 40:55D-62, et seq., the zoning enabling provisions of the Municipal Land Use Law) to permit (1) a use or principal structure in a district

restricted against such use or principal structure, ..."

The foregoing represent the so-called "positive criteria" attending such use variances.

b. The so-called "negative criteria", which must be satisfied prior to the grant of any such variance, is stated in the Municipal Land Use Law (N.J.S.A. 40:55D-70), as follows:

> "No variance or other relief may be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."

c. In the decision of the New Jersey Supreme Court in the case of Medici v. BPR Co., 107 N.J. 1, the court held, in part, as follows:

> i. That, if a use for which a variance is sought is not one which inherently serves the public good, the applicant must demonstrate and the board must specifically find that the use promotes the general welfare because a proposed site is particularly suitable for the proposed use; and,

ii. That an "enhanced quality of proof", as well as clear and specific findings by the board of adjustment that the grant of the use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance, are required; and,

iii. That such findings must satisfactorily reconcile the grant of a use variance with the zoning ordinance's continuing omission of the proposed use from those uses permitted in the zone district; and,

iv. That, in general, although commercial uses may inherently serve the general welfare in a particular community, the typical commercial use can be better described as a mere convenience to its patrons than as an inherent benefit to the general welfare; and,

v. That, if a board of adjustment cannot reach the conclusion that the governing body's continuing prohibition of the proposed use is not incompatible with a grant of the variance sought, it should deny

such variance.

d. However, Medici is also authority for the fairly clearly stated proposition that when a proposed use is found to be inherently beneficial, the applicant for such variance is not required to establish, through enhanced proof, that the variance sought is consistent with the intent and purpose of the zone plan.

e. Therefore, although an enhanced standard of proof that the variance sought is consistent with the intent and purpose of the zone plan is not required, what continues to be required is proof that the granting of such variance will not result in substantial detriment to the public good and will not substantial impair the intent and purpose of the zone plan and zoning ordinance.

f. Therefore, when a board of adjustment or the courts find that a proposed use is inherently beneficial to the public good, such findings, per se, satisfy the "positive criteria" of N.J.S.A. 40:55D-70(d), i.e. such a finding is equivalent to a finding of the requisite "special reasons".

g. In the case of Kingwood v. Board of Adjustment of the Township of Kingwood, 272 N.J. Super. 498, the Law Division of the New Jersey Superior Court held in a case involving a 197 foot high cellular communications tower intended to replace an existing 75 foot tower to be utilized by Bell Atlantic Mobile Systems to expand its cellular communication coverage area, that: "...when a proposed use variance promotes telecommunications, as proven by uncontroverted expert testimony, such use is inherently beneficial as a matter of law." (page 505).

h. In the instant case, the expert testimony is not uncontroverted.

i. The Law Division in the Kingwood case relied in part on the decision of the New Jersey Supreme Court in Sica

v. Board of Adjustment of Tp. of Wall, 127 N.J. 152, as authority for the proposition that, given a use is held to be inherently beneficial and therefore, per se, satisfies the "positive criteria", i.e., special reasons exist as a matter of law, the applicant must still demonstrate and the board must still find that the "negative criteria" are also satisfied.

j. The New Jersey Supreme Court, in the Sica case, established the following four-prong test as a guide to boards of adjustment when balancing, as they are entitled and obliged to do, the "positive" and "negative" criteria:

> i. The board should identify the public interest at stake;
>
> ii. The board should identify the detrimental effect, if any, which will ensue from the grant of the variance;
>
> iii. In appropriate situations, the board may reduce the detrimental effect by imposing reasonable conditions upon the use, and;
>
> iv. The board should weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

k. In applying this "balancing test", the New Jersey Supreme Court, in Sica, also held that "...while properly making it more difficult for municipalities to exclude inherently beneficial uses...permits such exclusion when the negative impact of the use is significant."

l. The Board, having been benefited by the statement

of the case and statutory law attending these types of applications given by and on behalf of the applicant, the objectors and the Board's own attorney, does herewith undertake to apply that law, to the extent the Board finds same applicable, to the facts the Board finds to exist, the Board herewith concluding as set forth hereinbelow.

m. The Board accepts that, in general, cellular telecommunications towers and related facilities are "inherently beneficial" to the public good and, as such, in most cases would relieve an applicant of the otherwise requisite burden of demonstrating the existence of "special reasons".

n. However, the Board is of the opinion and herewith concludes that, although such cellular telecommunications facilities are inherently beneficial to the public good, as held in the case law of the New Jersey Superior Court, those cases are fact sensitive and, to some extent, distinguishable from the present application.

o. Particularly, if no cellular telecommunications services existed in Blairstown Township and the surrounding communities (with respect to which Blairstown Township may very well have a regional and "non-parochial" service obligation) and the present applicant before the Board was the first to provide such service where none previously existed, then, most certainly, it would be clear that the use is inherently beneficial to the public good by providing the communication services the courts have held are inherently beneficial.

p. However, this is not the case. Particularly, Bell Atlantic Mobile Services, by virtue of an application approved by this Board in September, 1993, and, further, by virtue of cellular towers Bell Atlantic Mobile Systems maintains in surrounding communities, already provides cellular telephone service to the Township and surrounding areas, which service has not been demonstrated as being so

inadequate as to not be "inherently beneficial".

q. Additionally, the present applicant acknowledges that, although it provides some service coverage to the Blairstown Township area, the true purpose of the instant application is to enhance that service and fill in certain "gaps" (interruptions) of service coverage because of distances involved, terrain "shadowing" and other considerations relating to existing cell facilities.

r. This being the case (that there are already the presumptively adequate cellular telecommunications services within the Township), the Board concludes that the inherent benefit resulting from such facilities has already been achieved and presently exists in the Township.

s. The Board questions the extension of the "inherently beneficial" concept to additional telecommunications facilities when generally adequate service already exists.

t. That is, is a municipality constrained to grant multiple successive variance applications for even an "inherently beneficial" use thereby permitting the proliferation of such facilities, when such further proliferation (beyond the existence of basically adequate existing service) offers what appears to the Board to be a mere economic advantage to the applicant with perhaps some di minimus additional service, convenience to the subsequent applicant's subscribers? This Board thinks not.

u. The Board herewith identifies "the public interest at stake" to be the di minimus enhancement of existing cellular service which enhancement the Board characterizes as more of a mere convenience than an essential service. That is, telecommunication services are already available in most of the municipality with reasonably good signal quality and strength, both through primary ("A" channel) and secondary ("B" channel) service providers.

v. The Board believes that the query in paragraphs (s) and (t), above, and its analysis thereof rationally relates to the suggestions of the New Jersey Supreme Court in the Sica case that it undertake the four-prong inquiry and "balancing test" described therein.

w. In so doing, the Board finds that the weight and persuasiveness of the otherwise "inherently beneficial" use (the significance of the "public interest at stake") is considerably diminished when adequate cellular telephone service already exists in the Township.

x. Such diminished "inherent benefit" of the use the Board herewith finds to be substantially outweighed by the detriments to the public good and by the detriments to the zone plan and zoning ordinance as detailed hereinbelow.

y. Therefore, although this Board recognizes its inability to make "new law", as such, or deviate from any existing applicable case or statutory law, it distinguishes the cases where such cellular telephone service have been found to be "inherently beneficial" from the instant case for the reasons detailed hereinabove.

z. With respect to the "negative criteria" of N.J.S.A. 40:55D-70, to wit, that the variance may only be granted when same will not result in substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance, the Board concludes as follows:

i. The pristine ridgeline and panoramic dramatic views in the section of the Township intended to be invaded by the 180 foot telecommunications tower would be unnecessarily adversely impacted by same, as would be the prized rural character of the Township, which character and visual amenities are enjoyed by local residents and

vacationers who travel from great distances to enjoy the pristine scenic beauty of the area, including, particularly, the Delaware Water Gap National Recreational Area, which has a nationwide reputation and popularity.

ii. Equally efficient or perhaps even superior coverage is available to the applicant in other locations in the Township within which such a tower would be less intrusive and invasive then at the location selected.

iii. For the reasons testified to and reported upon by Lee Pavel, the MAI appraiser engaged by objector, Partridge Glen Associates, the Board herewith concludes that the visually negative impacts and the marketing public perception of potential public health and safety risks from such a facility which, as more fully detailed hereinabove, the Board concludes to be "marketing reality", will serve to diminish surrounding property values, thereby resulting in substantial detriment to the public good.

iv. By the admission of the applicant's own experts, the establishment of this facility will not entirely eliminate all service coverage "gaps" in the 30.90 square mile Blairstown Township area and there will, presumptively, be a need for additional tower facilities in the future. This being the case, the lack of an overall comprehensive

plan of thorough cellular coverage will result in the piecemeal and inefficient, from a land use planning perspective, future potential proliferation of tower sites, thereby substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance of the Township of Blairstown.

v. With respect to the "third prong" of the Sica case test, relating to the possible mitigation of adverse impacts or detrimental effects by the imposition of reasonable conditions, the Board feels that this application is, in effect, an "all or nothing" situation and can envision no conditions available for imposition which would diminish those negative impacts.

vi. Although site suitability per se, appears, based upon the case law, to not be a consideration when a use is found to be "inherently beneficial", the Board concludes that the issue of site superiority and alternate equivalent site availability is an appropriate consideration, particularly so when, again, basic cellular service already exists in the municipality.

vii. From a site superiority perspective, the Board has not been convinced by the applicant, which always has the burden of so doing, that the site is any more than merely adequate for the applicant's purposes and is not superior to other sites in the municipality. More particularly, the Board

concludes, based upon the testimony and other evidence presented to it, that a number of other sites, which are at least equivalent, if not superior, to the applicant's site, exist, including, but not limited to, the potential ability for co-location of the applicant's facilities on the Service Electric Cable T.V. tower, the New Jersey State Police tower or the Warren County 911 tower to be erected.

viii. The Board is concerned, and somewhat suspicious, as to the applicant's unwillingness to conduct the "balloon test" of visibility of the proposed tower, prior to its construction. In view of the lack of this test, the Board finds that at least the potential exists for the visibility of the tower to be considerably more significant than testified to be the applicant's experts and, therefore, the "visual nuisance" attending same to be considerably more significant than has previously been quantified. From this the Board concludes that the potential exists for an even more significant adverse impact to the public good, relating to that enhanced visibility and "visual nuisance", than the Board has already found to exist."

NOW, THEREFORE, BE IT RESOLVED, by the Blairstown Township Zoning Board of Adjustment that, as a result of the foregoing basic FINDINGS OF FACT and ultimate CONCLUSIONS based thereon, the following OFFICIAL ACTION is taken with respect thereto:

1. Application ZB-2-94, being the application of Pennsylvania Cellular Telephone Corporation, seeking approval to construct a 180 foot high cellular telecommunications tower with an attendant 12 foot by 20 foot "control building", together with other site appurtenances, improvements and amenities, all as detailed on the site plan plats submitted and as identified in Appendix II of this Resolution, all on property owned by Howard R. Hill, Jr. and Norma M. Hill, said property known and designated as Block 2003, Lot 14.01, as designated on the Blairstown Township Tax Map, for a 100 foot by 100 foot portion thereof the applicant intends a leasehold arrangement with the property owners, BE and same is herewith DENIED, for the reasons set forth hereinabove.

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2. The ancillary aspect of the application seeking relief pursuant to N.J.S.A. 40:55D-36, from the requirement that a building lot abut an approved and improved public street given access thereto (N.J.S.A. 40:55D-35) is specifically herewith NOT DECIDED by the Board, the Board being of the opinion that such relief is entirely dependent upon the granting of the use variance, which is the primary relief and which has been denied, the applicant having not completed its application nor made its presentation in support thereof, which was intended to be undertaken during the site plan application administration phase.

3. The companion application for site plan review and approval is also specifically herewith NOT DECIDED by this Board, in that the applicant has not submitted a complete application and has, upon the record, acknowledged that the site plan phase, having been bifurcated from and being ancillary to the use variance phase, need not reached for decision unless and until the use variance application was granted by the Board.

BLAIRSTOWN TOWNSHIP ZONING
BOARD OF ADJUSTMENT

ELWYN V. BARKER, CHAIRMAN

PATRICIA KOLB, CLERK

The foregoing Resolution is hereby certified to be a true and complete memorialization of the Official Action taken by the Blairstown Township Zoning Board of Adjustment at its regular meeting held on September 13, 1994, by a motion and vote as follows:

MOTION TO DENY THE USE VARIANCE RELIEF SOUGHT IN APPLICATION ZB-2-94 (PENNSYLVANIA CELLULAR TELEPHONE CORPORATION):

IN FAVOR: Mr. Seal, Mr. DiGrazia, Mr. Lascari, Mrs. Ardia, Mr. Jones, Mr. VanDerWal.

OPPOSED: Mr. Miller.

ABSTAIN: NONE.

ATTEST:

PATRICIA KOLB, CLERK
BLAIRSTOWN TOWNSHIP
ZONING BOARD OF ADJUSTMENT

DATED: October 25, 1994
REV. November 3, 1994

EXHIBIT B

PENNSYLVANIA CELLULAR TELEPHONE CORP., Appellant	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	CIVIL ACTION
THE BOARD OF SUPERVISORS OF CLIFTON TOWNSHIP, Appellee	94-CIV-2595

MEMORANDUM and ORDER

WALSH, P.J.

Before the Court is the zoning appeal of Pennsylvania Cellular Telephone Corp. (Corporation), whose application for conditional use zoning approval of a cellular telephone communications tower and switching building in Clifton Township was denied by that municipality's Board of Supervisors (Board). After reviewing the known facts in conjunction with the applicable law, we have concluded that the Board's decision was an abuse of discretion. The companion principles of fairness and equity call for the reversal of the Board's disposition of the Corporation's conditional use application.

On December 14, 1993, the Appellant submitted an application and plans to Clifton Township for conditional use approval to place and operate certain telecommunications equipment on the property of an individual named Ralph Trapper. The proposed tower was to be two hundred eighty feet in height with a triangular base and a red light at its apex, and the adjacent switching building was to be one story, two hundred forty square feet with no on-site employees.

On March 16, 1994, the Township Supervisors held a public hearing to consider the requested conditional use permit of the Corporation, and at the hearing evidence was presented by numerous interested parties, communications and engineering professionals and area residents. A regular meeting of the Board was held on April 9, 1994, at which time its members voted unanimously to deny the application. This decision was reduced to writing on April 29, and it is this decision which is termed an abuse of discretion by the Appellee.

Before we examine the information offered at the hearing and the Board's decision and justification therefore, the Court shall set forth the guidelines to be employed in examining the accuracy of decisions of zoning boards or officers in general. If a trial court has not taken any additional evidence in a

land use appeal, its scope of review is limited to a determination of whether the governing body has committed an error of law or abused its discretion; the latter would occur if the group's findings are inappropriate or not supported by substantial evidence. Township of Birmingham v. Chadds Ford Tavern, 132 Pa. Cmwlth. 312, 572 A.2d 855 (1990); Lower Paxton Township Supervisors v. Okonteski, 153 Pa. Cmwlth. 36, 620 A.2d 602 (1993). If a zoning board's decision is legally sound and supported by substantial evidence, it shall be upheld by the Court. Profera, Inc. vs. City of Scranton Board of Zoning Appeal, 87-CIV-2274, C.P. Lack. Cty., slip opinion of Walsh, P.J. (12-12-1988). The zoning issue before the Court presently, termed conditional use, is, along with a special exception, "actually a permitted use absent proof that advice impact on the public interest is greater than might be expected under normal circumstances." Robinson Township v. Westinghouse Broadcasting Co., 63 Pa. Cmwlth. 510, 440 A.2d 642 (1982).

At the hearing before the Clifton Township Board, testimony was offered by certain area residents who live in close proximity to the proposed project site, and these individuals expressed concern about tower lights which would be visible from their homes and possibly shine in their residences at night, which may interfere with the use of their homes during

the evening hours. The Board apparently placed a great deal of weight on this potential problem, mentioning in its Findings of Fact that:

* * * * *

8. The proposed cellular telephone tower site is located on Township Road 308 directly across from the Big Bass Lake Residential Subdivision. The Big Bass Lake Subdivision is the largest residential subdivision in Clifton Township containing over one thousand residential lots.

9. The proposed cellular telephone tower will be lighted during daytime hours with flashing white strobe lights. During nighttime hours the tower will be lighted with a series of red lights from a point above the base of the tower to the top of the tower. All lighting is as specified and required by the Federal Aviation Agency. Two red side lights with 120 watt bulbs would be located 150 feet up the tower. A flashing 300 watt bulb would be placed at the top of the tower.

10. At the public hearing the applicant submitted a series of photos marked Exhibit "L" evidencing the proposed view and sight of the tower from locations throughout residential areas adjoining the tower site.

11. From hearing testimony it can be concluded that the proposed tower and its nighttime lighting system would be visible from residential homes located within the more densely populated R-1 Residential Zone surrounding the tower site.

12. Neighboring property owners objected to the fact the nighttime lighting could be seen from their property and would shine into their bedrooms at night so as to interfere with their sleep and the use of their residential property.

(Emphasis ours).

In its written decision, the Board reached the following Conclusions of Law:

* * * * * *

> 4. The Applicant has failed to meet its burden of proof that the proposed 280 foot high tower will not jeopardize the public health, safety, welfare and convenience. The record is uncontradicted that the tower can be seen from throughout the residential area particularly in seasons of the year when the leaves are off the trees that would otherwise screen the view of the tower and screen the light projecting from it during nighttime hours.
>
> 5. The opponents of the application met the burden of proof of showing that the lights on the tower would be visible from their homes and would shine into their homes at night thereby interfering with the use of their homes.
>
> 6. The Applicant failed to show any necessity to locate the cellular tower on this particular site located in a densely populated residential area. In its review of the proposed tower plan, the Clifton Township Planning Commission indicated that there may be other more suitable sites in Clifton Township for construction of the tower in less densely populated and residentially developed areas of the Township.
>
> (Emphasis ours).

In our opinion, the determination of the Board of Supervisors was incorrect. Chiefly, we note that while there was discussion of the possibility that the blinking red light at the tower's top could be seen at night and would shine into some area homes, it was not shown that the health, safety or welfare of any township resident would be jeopardized. We

believe it is significant that no evidence, except the worried ruminations of a few area dwellers, was offered to show that the top light, which radiates from a mere 300 watt bulb, would shine that brightly that far. The Court agrees with the Appellant that the faint possibility that an area resident would be able to see a low intensity light from the peak of a 280 foot tower from a substantial distance poses no threat to the well-being of Township residents.

The majority of the testimony offered at the hearing tended to support the Corporation's position that it was careful and thorough in addressing community health, safety and welfare concerns in designing its project. The Appellant's witnesses testified to the (2) structural soundness of the tower, (1) proposed maintenance, (3) quality of design standards, (4) acceptability of radio frequency signals, (5) benefits to the community and (6) the tower's expected impact on property values in the community, which was zero devaluation attributable to the proposed project. Not only have the protestants failed to show a threat to the Township's well-being, but the overwhelming weight of the evidence showed that the proposed project would have little or no effect on area residents and the properties they own.

Incidentally, the Board committed an additional error in determining that the Corporation "failed to meet its burden of proof that the ... tower will not jeopardize the public health,

safety ... " and other concerns of the community.[1] Long-standing decisional law dictates that the burden first falls on the protestants, and if met by them, although in this instance it was not, it shifts to the applicant to rebut the issue of detrimental impact on area residents and property.[2] This issue is not central to our ruling, as we have already determined that the Board's findings did not rest on adequate evidence, but we mention it nevertheless in the interest of clarifying the factual and legal issues contained in this dispute.

Because the decision of the Board of Supervisors was neither legally sound nor supported by substantial evidence, we will reverse it and direct that the Appellant be granted a conditional use as requested in its Application.

Our Order is attached.

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[1] Conclusion of law #4.

[2] Bray v. Zoning Board of Adjustment, 48 Pa. Cmwlth. 523, 410 A.2d 909 (1980).